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Laudatory Invasion of Privacy

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IS LAUDATORY INVASION of privacy actionable?

It can be said that invasion of privacy as an independent tort was born when Samuel D. Warren and Louis D. Brandeis published in the December 1890 issue of The Harvard Law Review[1] a most influential and thereafter widely cited article entitled *The Right to Privacy,* urging the recognition of the right of privacy as an independent right of an individual.

Their convincing arguments brought recognition of the doctrine of the right of privacy by an overwhelming majority of American jurisdictions, either by case[2] or by statutory law.[3] It is now well established that there is a right of privacy which is not merely incidental to some other recognized right.[4] In the recent Connecticut birth control case, *Griswold v. Connecticut,*[5] the United States Supreme Court said that the right of privacy is a right guaranteed by the Constitution.

Although seventy-seven years have passed since its launching, the right of privacy is still in its infancy. But we can say that the doctrine is no longer a generality and courts have developed principles which are applied and followed in jurisdictions where the doctrine has been recognized.[6]

At a moment when privacy is increasingly encroached upon by the complexity of modern life, making its attainment almost impossible, courts are charting the line beyond which prying curiosity cannot go.[7]

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1 Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

2 Prosser, Privacy, 48 Cal. L. Rev. 383 (1960); For additional material on the subject matter of right of privacy, see: Davis, What Do We Mean by "Right to Privacy"?, 4 S.D.L.R. 1 (1959); Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L. Rev. 962 (1964); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law and Contemp. Prob. 326 (1966); Annotations on the Right of Privacy: 138 A.L.R. 22 (1942); 168 A.L.R. 446 (1947), 14 A.L.R.2d 750 (1950).

3 New York, Oklahoma, Utah, and Virginia have adopted statutes recognizing the right of privacy: N. Y. Civil Rights Law §§ 50, 51; Okla. Stat. Ann. Tit. 21, §§ 839-40; Utah Code Ann. § 76-4-9; Va. Code § 8-650 (1950).

4 Cason v. Baskin, 155 Fla. 198, 20 So.2d 243, 168 A.L.R. 430 (1945), *rehearing,* 30 So.2d 635 (1945).

5 381 U.S. 479 (1965); this case held the anti-contraceptive statute unconstitutional, violating the constitutional right of privacy emanating from the provisions of the Bill of Rights.

6 Nizer, The Right of Privacy, 39 Mich. L. Rev. 526 (1941); as to measure of damages, see, Oleck, Cases on Damages, 32, 653-6 (1962).

7 Seavey, Cogitation on Torts (Third in the Roscoe Pound Lectureship Series), The University of Nebraska Press, 1954.

Actionable invasion of the right of privacy has been defined as:

> The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.[8]

This definition imposes limitations on the scope of the right of privacy. Protection is restricted by the standard of a person of ordinary sensibilities.[9] The right does not afford protection to supersensitivity.[10] Limitations were recognized by Warren and Brandeis who said that protection should be aimed only at flagrant breaches of decency and propriety.[11]

General Principles Pertaining to an Action For Invasion of the Right of Privacy

The right is considered as an incident of the person and not of property.[12] Since it is a personal right, designed to protect the feelings and sensibilities of human beings, it cannot be asserted and enforced by a corporation.[13] It is a purely personal action which dies with the injured party,[14] unless survival of the action is provided for by statute.[15] The

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[8] 41 Am. Jur., Privacy, § 2 (1962).

[9] Truxes v. Kenco Enterprises, Inc., 119 N.W.2d 914 (S.D. 1963); Strickler v. National Broadcasting Co., 167 F.Supp. 68 (S.D. Cal. 1958); Reed v. Real Detective Publ. Co., 63 Ariz. 294, 162 P.2d 133 (1945).

[10] Cason v. Baskin, *supra* n. 4; also see, Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956); In Harms v. Miami Daily News, Inc., 127 So.2d 715, 718 (Fla. App. 1961), defendant published plaintiff's name and business telephone number and told its readers to call that number and ask for the plaintiff if they wanted to hear a "sexy voice." The court held: "In determining the extent of the right of privacy the standard by which the right is measured is based upon a concept of the man of reasonable sensibility; the hypersensitive individual will not be protected."

[11] Warren and Brandeis, *op. cit. supra* n. 1.

[12] Reed v. Real Detective Publ. Co., *supra* n. 9.

[13] In Association for Preservation of Freedom of Choice, Inc. v. Nation Co., 35 Misc.2d 42, 228 N.Y.S.2d 628, 631 (S.Ct. 1962), plaintiff corporation instituted an action by its representative, among other things, for invasion of privacy. Held that ". . . incorporated association must sue in its own name and not by representative and that corporation could not maintain suit for invasion of privacy."

The following cases dealing with this point, agree with Association for Preservation of Freedom of Choice in that a corporation has no right of privacy: Vassar College v. Loose-Wiles Biscuit Co., 197 F. 982 (W.D. Me., 1912); Maysville Transit Co. v. Ort, 296 Ky. 524, 177 S.W.2d 369 (1944).

[14] In Maritote v. Desilu Productions, Inc., 345 F.2d 418 (7th Cir. 1965), the court held that under the Illinois law an action brought by administratrix, wife, and son for recovery of damages for invasion of decedent's right of privacy by publication and telecasts regarding decedent, cannot be maintained. The right of privacy can be asserted only by the person whose privacy was invaded. In the absence of any reference to relatives by the complained publication, an action cannot be maintained by them.

[15] Statutes of Oklahoma and Virginia allow the survival of actions for invasion of privacy. Okla. Stat. Annot., 21-840; Va. Code 8-650.

right is lost where the complaining party has consented to the publication complained of.[16] It is a well settled rule that want of consent is essential to make an invasion of the right of privacy actionable. It does not exist if the injured party has become a public character and thereby impliedly waived his right to privacy,[17] nor in connection with the life of a person in whom the public has a rightful interest.[18] In regard to the ordinary dissemination of news and information, the right is subordinate to legitimate public interest.[19] The man of reasonable sensibilities is the norm by which the right of privacy is measured.[20] Spoken as well as written words can constitute actionable invasion of privacy.[21] In a case based on invasion of the right of privacy, malice is not required to be shown,[22] since it is not an essential element of violation of the right.[23] The plaintiff does not have to allege or prove any special or pecuniary damages.[24] The truth of the published matter does not constitute a defense to such an action.[25]

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[16] Johnson v. Boeing Airplane Co., 175 Kan. 275, 262 P.2d 808 (1953).

[17] Smith v. Doss, 37 So.2d 118 (Ala. 1948); Berg v. Minneapolis Star and Tribune Co., 79 F.Supp. 957 (Minn. 1948); Molony v. Boy Comics Publishers, Inc., 277 App. Div. 166, 98 N.Y.S.2d 119 (1950); Leverton v. Curtis Publ. Co., 97 F.Supp. 181 (E.D. Pa. 1951) *aff'd*, 192 F.2d 974 (3d Cir. 1951); Garner v. Triangle Publications, Inc., 97 F. Supp. 546 (S.D. N.Y. 1951); Abernathy v. Thornton, 263 Ala. 496, 83 So.2d 235 (1955); Oma v. Hillman Periodicals, Inc., 281 App. Div. 240, 118 N.Y.S.2d 720 (1953); Jacova v. Southern Radio and Television Co., 83 So.2d 34 (Fla. 1955); Jenkins v. Dell Publications, 251 F.2d 447 (3rd Cir. 1958); In Werner v. Times-Mirror Co., 14 Cal. Rptr. 208, 212 (Cal.App. 1961), the court stated: "A person may, by his own activities or by force of circumstances, become a public personage and thereby relinquish a part of his right of privacy to the extent that the public has a legitimate interest in his doings, affairs or character."

[18] Sidis v. F-R Publ. Corp., 113 F.2d 806 (2d Cir. 1940).

[19] Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344, 348 (1956), was an action to enjoin the sale of newspapers which contained a photograph of the mutilated body of the plaintiff's murdered son. The Supreme Court of Georgia held that the mother's right of privacy has not been violated: "Where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy. There are many instances of grief and human suffering which the law can not redress. The present case is one of those instances."

In Carlisle v. Fawcett Publications, Inc., 20 Cal. Rptr. 405 (Cal. App. 1962), considering the limits of the right of privacy, the court said that when current newsworthy events occur, the persons involved may be named and discussed in newspapers or over the air even though such publicity actually invades the privacy of the individual; Hubbard v. Journal Publ. Co., 69 N.M. 473, 368 P.2d 147 (1962).

[20] 4 Restatement of Torts, § 867, Comment c; Truxes v. Kenco Enterprises, Inc., *supra* n. 9; Harms v. Miami Daily News, Inc., *supra* n. 10.

[21] Norris v. Moskin Stores, Inc., 272 Ala. 174, 132 So.2d 321 (1961); There is authority according to which mere spoken words cannot constitute actionable invasion of privacy; see Cason v. Baskin, *supra* n. 4 at 251, 252.

[22] Cason v. Baskin, *supra* n. 4.

[23] Werner v. Times-Mirror Co., *supra* n. 17; In Fairfield v. American Photocopy Equipment Co., 138 Cal.App.2d 82, 291 P.2d 194 (1955), the court, commenting on the elements of the invasion of right of privacy pointed out that if the publication does not amount to actionable invasion of plaintiff's right, the presence of actual malice in the publication would not change that result and would not render it actionable.

[24] Cason v. Baskin, *supra* n. 4.

[25] *Ibid.*

Types of Invasion of Right of Privacy and Interests Protected

In a comprehensive survey of authorities,[26] Prosser found that courts have protected individuals against four kinds of invasion of privacy, namely, (1) intrusion upon the plaintiff's physical and mental seclusion or solitude, or into his private affairs; (2) public disclosure of private facts about the plaintiff; (3) publicity which presents the plaintiff in a false light to the public; and (4) appropriation of plaintiff's identity for the defendant's benefit or advantage. Laudatory invasion of privacy cases fall into the category of public disclosure of private facts about the plaintiff.

It has been held that in order to constitute invasion by public disclosure, the disclosed fact must until then have been private and not public,[27] since there can be no privacy in that which is already public.[28] The disclosure must be accompanied by sufficient publicity, communicated either by written or spoken words to a large number of people,[29] as opposed to only a few.[30] In addition, the disclosed fact must be of such a nature that a reasonable man could foresee that it would probably cause mental distress,[31] shame, or humiliation to a person of ordinary sensibilities.[32]

Does Laudatory Invasion Constitute A Substantial Invasion of Privacy?

To constitute a cause of action, an invasion must be a substantial, serious, or indecent intrusion upon the private life of another.[33] Liability exists and accrues only where the intrusion has gone beyond the limits of decency.[34] Publications describing ordinary goings or comings of persons, and any other publications to which people do not ordinarily seriously object, do not amount to invasion of right and are not actionable.[35] The law does not provide a remedy for every annoyance that

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[26] Prosser, *op. cit. supra* n. 2; Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964).

[27] Gill v. Hearst Publ. Co., 40 Cal. Rptr. 2d 224, 253 P.2d 441 (1953).

[28] Melvin v. Reid, 112 Cal.App. 285, 297 P. 91 (1931).

[29] Trammell v. Citizens News Co., 285 Ky. 529, 148 S.W.2d 708 (1941).

[30] Holloman v. Life Ins. Co. of Va., 192 S.C. 454, 7 S.E.2d 169 (1940); Brauer v. The Globe Newspaper Co., 217 N.E.2d 736 (Mass. 1966).

[31] Reed v. Real Detective Publ. Co., *supra* n. 9.

[32] Prosser, *op. cit. supra* n. 2; Bernstein v. National Broadcasting Co., 129 F.Supp. 817 (D.C. 1955); *aff'd*, 232 F.2d 369 (D.C. Cir. 1956).

[33] Frick v. Boyd, 214 N.E.2d 460 (S.Ct. Mass. 1966).

[34] 4 Restatement of Torts, § 867, Comment d.

[35] Aquino v. Bulletin Co., 190 Pa. Super. 528, 154 A.2d 422 (1959).

occurs in everyday life, regardless of its distressing effect, lack of propriety, and good taste.[36]

In *Samuel v. Curtis Publishing Co.*,[37] the plaintiff instituted an action for invasion of privacy for the publication of a photograph in The Saturday Evening Post in connection with an article on suicide. The photograph showed the plaintiff trying to dissuade a woman from jumping off the Golden Gate Bridge. The caption of the picture fittingly portrayed the scene, naming plaintiff and the woman.

In holding that no actionable invasion of plaintiff's privacy occurred, the court said that where the photograph depicts nothing to shock the ordinary sense of decency or propriety, where the photograph in itself does not present something uncomplimentary or discreditable, and where the caption and article do not add new meaning to the photograph making it uncomplimentary, no actionable invasion of the right occurs. The court also stated that the picture was most laudatory and in no way showed the plaintiff as reprehensible. A reasonable man could find nothing in plaintiff's conduct which would give rise to the belief that the picture would offend the sensibilities of a normal person. The court also said that the picture was newsworthy and constituted a privileged publication precluding plaintiff's recovery. It is plain that the published photograph of the plaintiff in this case made him a hero in the eyes of the public by praising his humanitarian services. If courts recognized causes of action in cases like this, then contrary to the objective of the law, hypersensitivity would be protected.

In *Gill v. Hearst Publishing Co.*,[38] the plaintiffs, husband and wife, sued for invasion of privacy. They alleged that their privacy had been invaded by a picture taken at plaintiffs' place of business and published in *Harper's Bazaar,* which presented the couple in a romantic pose, the husband having one arm about his wife. The plaintiffs had not consented to either the taking of the photograph or its publication.

The court held that mere publication of the photograph standing alone did not amount to an actionable invasion of plaintiffs' right of privacy and pointed out that there was no disclosure of a private fact theretofore unknown to the public. The publication of the picture only gave extended publicity to a larger audience of an incident that could have been witnessed at the time of its occurrence by a smaller audience. In addition, the photograph portraying the couple in an amorous pose was not uncomplimentary or discrediting in itself thereby making its publication objectionable as going beyond the limits of decency. In fact, the court said that the photograph may very well be regarded as complimentary and pleasing in its pictorial presentation of plaintiffs. The

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[36] Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E.2d 286 (1951).

[37] 122 F.Supp. 327 (N.D. Cal. 1954).

[38] Gill v. Hearst Publ. Co., *supra* n. 27.

photograph of the plaintiffs depicts an incident that can be seen every day, everywhere, and is readily distinguishable from pictures which are shocking, revolting, or indecent.[39]

In *Gill v. Curtis Publishing Co.*,[40] the plaintiffs brought an action for invasion of privacy alleging that without their consent the defendant published in the Ladies Home Journal, in connection with an article entitled *Love,* the same picture as in the *Hearst* case.[41] The picture was captioned "Publicized as glamorous, desirable, love at first sight is a bad risk."

The court found that plaintiffs had stated a cause of action. The court stated that when words are related to a photograph, the public interest may be prevailing and such a publication may be privileged. But in this case it was held that the objective of the article could have been achieved and the public interest satisfied without the publication of plaintiffs' picture. The court further found that the caption and article portrayed the plaintiffs as persons who had only a sexual interest in each other thereby seriously impinging their sensibilities. This case is an example of how words may turn a complimentary, non-objectionable photograph into a publication constituting an actionable invasion of privacy. Both decisions are sound principles of law.

The plaintiff in *Cason v. Baskin*[42] sued to recover damages for invasion of privacy by the defendant who had written a book which was published without the plaintiff's consent. The defendant, through a vivid, colorful, and graphic description, created a pen portrait of plaintiff recognizable to plaintiff and her friends, although the defendant made no reference whatever to the plaintiff by name.

The court held that a prima facie case had been stated which would entitle plaintiff to recover at least nominal damages. The court found that the book complimented the plaintiff, portraying her as a fine, intelligent person with an attractive personality. However, the court held that since the book was also a vivid and intimate character sketch of a person who is not a public personage, plaintiff had stated a cause of action and could recover nominal damages.

It seems clear, however, that in this case defendant did not invade plaintiff's private life. Plaintiff was a census taker, a public servant, and it was his conduct on the job that was described by defendant.

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[39] In Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1962), the court held the right of privacy had been invaded where a picture of plaintiff was taken against her protest while she was in bed in a hospital and was published in connection with an article describing her rare disease and unnecessarily identified her.

In Daily Times Democrat v. Graham, 162 So.2d 474 (Ala. 1964), held right of privacy had been invaded where a picture of plaintiff was surreptitiously taken and published, depicting plaintiff in an embarrassing pose with her dress blown up.

[40] 38 Cal. Rptr. 2d 273, 239 P.2d 630 (1952).

[41] Gill v. Hearst Publ. Co., *supra* n. 27.

[42] Cason v. Baskin, *supra* n. 4.

Therefore, the court should have found the publication privileged since it dealt with matters of general interest.

The case of *Johnson v. Boeing Airplane Co.*,[43] was an action to recover damages for invasion of privacy. Plaintiff complained of the publication of his photograph by the defendant in conjunction with an advertisement in a magazine. The court found that there was implied consent which precluded plaintiff from recovery. The court stated that another reason why plaintiff could not recover was that plaintiff, according to his own admission, was complimented by the fact that the photograph presented him as a highly skilled worker performing an important and intricate job in the construction of an airplane.

It has been held that the essence of a cause of action in a privacy case is injury to the feelings of the injured person.[44] In the absence of such an injury, no cause of action can arise.

In *Frick v. Boyd*,[45] a case decided in Massachusetts where the common law right of privacy has not been recognized, the plaintiff instituted an action to enjoin distribution of a book written by defendant. Plaintiff alleged that the book invaded her right of privacy. In the book defendant described her 30 years of employment by plaintiff in social work at a vacation home for working girls founded and operated by plaintiff as a charity. All the references in the book to plaintiff were highly complimentary, expressing in an enthusiastic way defendant's admiration for petitioner's charitable endeavors.

The Supreme Judicial Court held that the facts did not warrant equitable relief. The court said with respect to the common law right of privacy in the Commonwealth, "If there is such a right in this Commonwealth, we would not be prepared to extend it to a case like the present." The court noted that it would determine the existence of the right of privacy in Massachusetts only when faced with a situation involving some substantial, serious, or indecent intrusion upon the private life of another. In the court's view, this harmless and inoffensive book did not present such a situation.

The court's denial of relief in this case rests on sound grounds. The book was a straightforward portrayal of events and was completely complimentary to the petitioner. It did not, for example, discuss in lurid detail the immoral past of a reformed prostitute,[46] nor did it cast doubt on the moral integrity of the petitioner.[47] It did not reveal

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[43] *Supra* n. 16.

[44] Werner v. Times-Mirror Co., *supra* n. 17.

[45] *Supra* note 33. See also, Themo v. New England Newspaper Publishing Co., 306 Mass. 54, 27 N.E.2d 753 (1940); Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E.2d 286 (1951).

[46] Melvin v. Reid, *supra* n. 28.

[47] Kerby v. Hal Roach Studios, Inc., 53 Cal.App.2d 207, 127 P.2d 577 (1942).

the intimate characteristics of the plaintiff,[48] nor did it involve an embellished and sensationalized account of an individual's domestic troubles.[49] It can hardly be said that the book involved in this case could be offensive to the sensibilities of an ordinary person.

The State of New York does not recognize the common law right of privacy. In that State, the right is derived from and governed by statute.[50]

In the case of *Spahn v. Julian Messner, Inc.*,[51] plaintiff, a major league baseball pitcher, sued for the invasion of his right of privacy by the publication of an unauthorized and intentionally fictionalized biography for juvenile readership. The court held that the plaintiff could recover. The court said that the plaintiff was a public figure and thus could be the subject of a biography published without his consent, even though the biography might contain some superficial inaccuracies. In this case, however, the biography was not based on truthful facts. Thus it was not privileged and could not be published without the consent of the individual.

In such case, the court observed, the laudatory nature of the fictionalized treatment is immaterial. Neither the view that it must be fictionalized to make it appealing to juvenile readership nor the complimentary nature of the fictionalized treatment is justification for the publication. This is so because the distorted presentation may make the plaintiff look ridiculous in the eyes of those who know the true facts. It is hard to determine what is laudatory, and one may strongly object to being depicted in a distorted way. Complimentary invasion of privacy may have some mitigating influence upon the assessment of damages.

In *Molony v. Boy Comics Publishing, Inc.*,[52] plaintiff sued to recover damages for the alleged violation of his right of privacy by the publication of a story in drawings, praising plaintiff's heroic action in rescue operations when a United States Army bomber crashed into the Empire State Building in New York City. In connection with the airplane disaster, plaintiff was catapulted into the public light and became a national figure.

The court found no violation of plaintiff's right to privacy under the New York Civil Rights statute,[53] since a publication dealing with a public figure was privileged. Further, the court also found the publi-

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[48] Cason v. Baskin, *supra* n. 4.

[49] Aquino v. Bulletin Co., *supra* n. 35.

[50] *Supra* n. 3; Cardy v. Maxwell, 9 Misc.2d 329, 169 N.Y.S.2d 547 (S.Ct. 1957).

[51] 23 App. Div.2d 216, 260 N.Y.S.2d 451 (1965); *aff'd*, 274 N.Y.S.2d 877 (1966).

[52] *Supra* n. 17.

[53] *Supra* n. 3.

cation free of libel and full of praise for the plaintiff for his heroic deeds.

Conclusion

The general principles controlling the right to recover for invasion of the right of privacy are fully applicable to laudatory invasion of privacy. Applying these principles, it is clear that an invasion of privacy which is laudatory in nature constitutes a cause of action if the publication is one which would be offensive and objectionable to a man of ordinary sensibilities. Therefore, whether a person may or may not be subjected to laudatory publicity without his consent will be determined by the sensitivities of a reasonable man.

The right of privacy may be subordinated to the prevailing public interest. For example, the right of privacy cannot be invoked where the laudatory use of a name or photograph is made, within the bounds of propriety and decency, in connection with the dissemination of news and information of public concern. Consequently, the legitimate public interest is a good defense in an action based on laudatory invasion of privacy.

If the facts give rise to a cause of action for invasion of privacy, the laudatory nature of the publication is no justification for the invasion of the right.

Disclosure of laudatory facts for commercial purposes gives rise to a cause of action regardless of the laudatory nature of the disclosed matter.

The holdings of the reviewed cases indicate that the laudatory nature of the invasion may have some influence as a mitigating factor in the assessment of damages.